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In the

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-9181

WALTER C. ATCHLEY,

Petitioner,

v.

JOE R. GREENHILL, CHIEF JUSTICE, AND ZOLLIE STEAKLEY, JACK POPE, THOMAS M. REAVLEY, SEARS MCGEE, JAMES G. DENTON AND SAM D. JOHNSON, ASSOCIATE JUSTICES, OF THE SUPREME COURT OF TEXAS AND JOHN H. MILLER, JUDGE OF THE DISTRICT COURT OF SAN PATRICIO COUNTY, TEXAS, 36TH JUDICIAL DISTRICT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Walter C. Atchley, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 1-2) is reported at 517 F. 2d 692 (5th Cir. 1975). The memorandum opinion of the United States District Court for the Southern District of Texas is unreported, and appears as Appendix B, *infra* pp. 1-6.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, *infra*, p. 1) was entered on August 15, 1975. A timely petition for rehearing was denied on October 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it is constitutionally permissible for state court judges financially interested in a case by reason of stock ownership in a corporate party and, in the case of the state district judge, by reason of payments to his son by the state court defendants for no proper legal services rendered, to sit in judgment in the case.

2. Whether it comports with minimum standards of procedural due process for a majority of the members of a state supreme court to vote on and decide the merits of a case pending in the state district court during a deer hunt and party hosted by the state court defendants and the state district judge on the land in controversy in the state court proceedings.

3. Whether the abstention or non-interference doctrine of *Younger v. Harris* can be extended to situations in which there is no ongoing state proceeding, criminal, civil or administrative, to furnish a basis for a claim of federal interference.

4. Whether there is a doctrine of judicial immunity which precludes federal suits against state court judges solely for injunctive or declaratory relief based on the Due Process Clause and the Civil Rights Act of 1871.

5. Whether Section 11 of Article V of the Texas Constitution is a mandatory provision requiring Texas Supreme Court Justices, as a ministerial duty, to disqualify themselves in any case wherein they may be interested or where they may have been counsel in the case, and to certify such disqualification to the governor of the state for appointment of substitute judges.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Civil Rights Act of 1871:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983

Texas Constitution, Section 11, Article V:

> "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, or any member of either, shall be thus disqualified to hear and determine any case or cases in said Court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such case or causes * * *" Vernon's Ann. Tex. Const., Art. V., Section 11

STATEMENT OF THE CASE

The Federal Proceedings

Petitioner brought this suit against state court judges for injunctive relief and declaratory judgment, based on the due process and equal protection clauses of the Fourteenth Amendment and the Civil Rights Act of 1871, 42 U.S.C. § 1983. Jurisdiction was asserted under 28 U.S.C. § 1343(3). The suit named as defendants seven members of the Supreme Court of Texas and the Judge of the District Court of San Patricio County, Texas. The suit sought an adjudication that judgments rendered against Petitioner and the State of Texas by the state district court and the Supreme Court of Texas were void, and should be set aside, by reason of violations of federal constitutional rights of Petitioner and the State of Texas during the course of the state court proceeding. The complaint further sought that the state court proceeding be reinstated in the state district court for determination on the merits in accordance with constitutionally permissible procedures, before judges not constitutionally disqualified.

The complaint in the present case was filed on December 7, 1973. Before answer date and before any pleadings had been filed by the Defendants, the District Court issued *sua sponte* its show cause order requiring Petitioner to file, on or before January 8, 1974, a written memorandum of arguments and authorities demonstrating why the complaint should not be dismissed and judgment rendered on the pleadings for Defendants. Petitioner timely filed such memorandum (q.v.). The court set its show cause order for hearing on January 11, 1974, and, after a brief hearing on such date, it dismissed this case from the bench.[1] Apparently mindful of procedural due process considerations, the District Judge gave Petitioner the right to file within 10 days, by way of motion for reconsideration, a reply to Defendants' memoranda furnished to Petitioner at the commencement of the hearing. Petitioner timely filed his motion for reconsideration, which was denied.

[1] The District Judge opened the hearing by apologizing to Defendants' counsel for the length of time that had elapsed between the filing of this suit and the action taken by the court with respect thereto (20 days after filing, 9 days after service), stating that he did not understand how the case could have been pending in his court for so long without being brought to his personal attention by his staff, and stating further that he intended to dispose of the case very promptly. Petitioner does not understand why the court found it necessary to make this unusual apology to the Defendants' counsel in open court, particularly since the hearing had been preceded by a somewhat lengthy conference *in camera* between the judge and Defendants' counsel.

Following oral argument in Atlanta on May 20, 1975, at which the court below, because of the importance of the case, offered unlimited time for argument to the Attorney General of Texas, representing the Defendants,[2] the Court of Appeals affirmed the District Court in a short *per curiam* opinion which contains no discussion of the facts or Petitioner's constitutional contentions.

In ruling on the dismissal of the complaint this Court accepts as true, as both courts below were required to, all of the material allegations of the complaint. *Warth v. Seldin*, 95 S. Ct. 2197, 2206 (1975); *Cruz v. Beto*, 405 U.S. 319, 321, 92 S. Ct. 1079, 1081, 31 L. Ed. 263 (1972); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 388 U.S. 172, 174-5, 84 S. Ct. 347, 349, 15 L. Ed. 2nd 247 (1965); *Cooper v. Pate*, 378 U.S. 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964). The complaint is liberally construed in favor of Petitioner, and the complaint should not be dismissed unless it appears beyond doubt that Petitioner could prove no set of facts in support of the claim which would entitle him to relief. *Jenkins v. McKeithan*, 395 U.S. 411, 421-2, 89 S. Ct. 1843, 1849, 23 L. Ed. 2d 404 (1969); *Conley v. Gibson*, 355 U.S. 41, 45-6, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957).

Although none of the Defendants denied any of the allegations of the complaint, and for very good reason, any such denials, if they had been made, would be disregarded on appeal from the dismissal of the complaint.

[2] Petitioner's counsel assumed, perhaps incorrectly, that the Court's offer of unlimited time extended reciprocally to Petitioner. Thus, it is likely that the tenure as well as the tenor of Petitioner's argument contributed to the obvious pain and discomfort, perhaps physical as well as emotional, experienced by at least two members of the panel below during such argument.

The following statement of the undenied facts is thus taken from the complaint:

The State Proceedings

Petitioner and the State of Texas, represented by its Attorney General (who is now counsel for the Defendant judges in this case) filed suit in the state district court in San Patricio County to recover for the Public Free School Fund of Texas from the state court defendants (numerous oil companies and individuals listed in the Local Rule 13(a) certificate in the court below) the title to a tract of land in San Patricio County, Texas which had been determined by the state surveyor appointed by the Commissioner of the General Land Office of Texas to be vacant and unsold public land, and to recover, in addition, the value of past production of oil and gas from such tract of land, alleged to be substantially in excess of $100,000,000.00. This state court proceeding is referred to in Petitioner's complaint and hereinafter as the Vacancy Case.[3] The Vacancy Case defendants filed

[3] A vacancy case is an ordinary land boundary suit with the difference that instead of being between competing private landowners, it is beween the State and private landowners, in which the State seeks to establish that there is a gap or vacancy between the original surveys upon which the original grants from the sovereign were made. Such gaps or vacancies were frequent in Texas, and were usually the results of surveying errors made by the early surveyors, often handicapped by crude instruments and methods, inclement weather, inhospitable terrain, hostile Indians, and lack of knowledge of the location of prior surveys by earlier sovereigns (Spanish, Mexican or the Republic of Texas) which were sometimes carelessly made because of the almost worthless value of the land surveyed and its seemingly inexhaustible extent. The authoritative Handbook of Texas estimates that vacancies "in 1940 may have amounted to as much as 5 per cent of the total area of the state." *The Handbook of Texas*, Vol. II, Page 23 (The Texas Historical Association, Austin, 1952). By constitutional and statutory provisions all of the vacant public land in Texas has long been dedicated to the Public Free School Fund. Vernon's Ann. Tex. Const. Art. 7 § 2. 15A Vernon's Ann. Civ. Stat. Art. 5416; see historical discussion in *Butler v. Sadler*, 399 S.W. 2d 411 (Tex. Civ. App. 1966, error ref'd. n.r.e.) Section 6 of Article 5421c, the Texas Vacancy Statute, sets forth procedures for determination of the existence of a vacancy. It provides generally that in the event of a determination of the existence of a vacancy, the State is entitled to recover for the benefit of the Texas Public Free School Fund

motions for summary judgment which were controverted and opposed by Petitioner and the State of Texas, lead counsel for both of whom was then the Honorable Price Daniel, formerly Attorney General, U. S. Senator and Governor of Texas, and now an Associate Justice of the Supreme Court of Texas. An extended hearing of several days' duration was held by the Defendant state district judge on these motions for summary judgment, following which they were overruled. At the request of the Vacancy Case defendants, another hearing was held on their same motions for summary judgment, and at the conclusion of this second hearing on the same motions, they were again overruled.

Thereafter, certain of the Vacancy Case defendants and their attorneys, together with the Defendant district judge, invited all of the members of the Supreme Court of Texas down to the land in controversy in the Vacancy Case for a deer hunt and party. Six of the nine members of the Supreme Court of Texas as then constituted, including certain of the Defendants in the present case, attended the party, and were lavishly entertained by the defendants in the Vacancy Case and their attorneys. The state supreme court justices were given a guided tour of the land in controversy in the Vacancy Case, which presumably included a showing of the disputed boundary line as claimed by the Vacancy Case defendants. During the deer hunt and party the attorneys for the Vacancy Case defendants (lead counsel for whom was former Governor John B. Connally) argued the merits of the Vacancy Case to the members of the

the value of any past production of oil or gas from the vacant public land, together with a royalty of 1/8 of future production. Where the applicant for the vacancy (the discoverer) is not the "good faith claimant" (claimant in possession) the applicant is rewarded only with a 1/16 royalty on future oil and gas production. The Vacancy Statute provides a system of allocation of the burden of these royalties between the oil company lessees of the land and the "good faith claimant" who is also entitled to buy the land he has occupied in the good faith belief it was within his survey at a price determined by the Commissioner of the General Land Office without regard to the mineral value or improvements of the land, but not less than $1.00 per acre. Petitioner discovered the vacancy involved in the Vacancy Case and followed all of the statutory procedures provided in the Vacancy Statute.

Supreme Court of Texas present, after which the defendant district judge took what he later called a "poll" of the state supreme court justices present as to the merits of the Vacancy Case, and obtained an "advance ruling" from the members of the Supreme Court of Texas present at the party as to the proper disposition of the Vacancy Case. After the party, the defendant district judge advised the attorneys for Petitioner and the State of Texas that a majority of the members of the Supreme Court of Texas had ruled in favor of the Vacancy Case defendants, and informed the attorneys for Petitioner and the State of Texas that Petitioner and the State of Texas would lose the Vacancy Case in the Supreme Court of Texas, regardless of the law, the facts or the state of the record.

After the party, the Defendant state district judge, on his own motion, called another hearing on the same motions for summary judgment which he had twice previously overruled. At this third "hearing" on the same motion no statements or arguments of counsel were allowed, and the Defendant district judge granted the Vacancy Case defendants' motions for summary judgment, offering from the bench no authorities, explanations or reasons for his ruling or for his reversal of position.

The intermediate appellate court affirmed, and the Supreme Court of Texas, by refusing the petition for writ of error by Plaintiff and the State of Texas with the notation "n.r.e." (no reversible error), affirmed the judgment of the lower courts, thus reaffirming the advance ruling made by a majority of the members of the Supreme Court of Texas at the deer hunt and party during the pendency of the Vacancy Case in the state district court.

During the pendency of the Vacancy Case in the state district court the Vacancy Case defendants paid large sums of money to the district judge's son, a recent law school graduate, which payments were not for any proper legal services rendered. Such son of the Defendant state district judge was married to a relative of various of the individual defendants in the Vacancy Case so that, by virtue of his

son's marriage, the state district judge was related by affinity to various of the individual Vacancy Case defendants. At the times of these payments to the state district judge's son, the state court defendants were already more than adequately represented by over 60 law firms of record in the case, constituting an aggregate of more than 1,000 lawyers, exclusive of in-house staff counsel for the major oil companies involved.

As is alleged in the uncontroverted complaint, both the defendant state district judge and certain of the defendant appellate judges owned stock in one or more of the corporate defendants in the Vacancy Case, and consequently such judges had a personal financial interest in the outcome of the Vacancy Case.

On the date of rendition of the judgment of the Supreme Court of Texas sought to be set aside as void in the present case, two of the members of the Supreme Court of Texas voluntarily disqualified themselves from the case and did not participate in the decision, the Honorable Price Daniel by reason of his having been counsel in the case and the Honorable Ruel Walker by reason apparently of his ownership of stock in one of the corporate defendants in the Vacancy Case. Section 11 of Article V of the Constitution of Texas provides as follows:

> "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case. When the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, *or any member of either*, shall be thus disqualified to hear and determine any case or cases in said Court, the same *shall* be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such case or causes * * * " (italics added).

The Supreme Court of Texas, when it refused the petition for writ of error of Petitioner and the State of Texas in the Vacancy Case, also denied the motions of Petitioner and the State of Texas, previously filed, for certification to the Governor of the disqualification of the two judges who were, on the record, disqualified by reason of having been counsel in the case[4], and for appointment of substitute judges. The denial by the Supreme Court of Texas of these motions was by nōtation only; the court gave no explanation or reason for its refusal to comply with the clear, unambiguous and mandatory requirement contained in the Texas Constitution. As alleged in the complaint, it is a legitimate inference that the reason for the refusal of the Defendant appellate justices to comply with the clear and mandatory requirement of the Texas Constitution was that if they had complied with such provision of the Constitution by granting the motion and admitting disinterested judges to participate in the consideration and determination of the Vacancy Case they would have endangered the prior commitment given by certain of the Defendant appellate justices to the Vacancy Case defendants and their counsel, and to the Defendant district judge, at the party on the land in controversy during the pendency of the Vacancy Case in the state district court, to vote and decide the Vacancy Case against Petitioner and the State of Texas.

Following the refusal of Petitioner's writ of error Petitioner filed his Motion for Rehearing in the Supreme Court of Texas, in which he urged that those members of that court who had participated in the deer hunt "proceedings" should disqualify themselves along with Justices Daniel and Walker, and certify their disqualification to the governor for appointment of substitute judges, so that the case could be "decided by a full tribunal with a clean slate in the case". This motion was stricken from the record and all copies,

[4] The Honorable Price Daniel and the Honorable Hawthorne Phillips. The term of the latter, who had been First Assistant Attorney General and so counsel for the State in the Vacancy Case in the trial court, expired prior to the ruling by the Supreme Court of Texas in the case, and he was not then a member of the court.

including the clerk's copy, were returned to the Petitioner so there remains no evidence of this motion on file in the record of the Vacancy Case. A copy is attached to Petitioner's complaint. This motion did not refer to the financial interest of the Defendant justices, which was not known to Petitioner at that time.

REASONS WHY WRIT SHOULD BE GRANTED

General Considerations

One reason why the writ should be allowed is simply that the complaint, unaided by any inferences, clearly states a federal constitutional cause of action. In the ordinary course of the fair and orderly administration of justice — with which, Petitioner assumes, this Court is deeply concerned — complaints possessing that particular characteristic should not be allowed to be dismissed.

Also, it is essential that judges be impartial and disinterested. On the present record, the Defendant state judges were neither.

The complaint is not only legally true; it is also true in fact. The Defendants' handling of the Vacancy Case, to express the matter just as delicately as it deserves, smells to high heaven; which should be a reason to allow a writ.

Further, the handling of the present case by the courts below, to put it perhaps more delicately than it deserves, reflects no great credit on the federal judiciary; it is bad law reaching a bad result, and it should be corrected.

With conspicuous lack of success, Petitioner essayed to impress on the court below the importance of this case. Despite this failure, Petitioner remains obdurately convinced of the validity of the reasoning he advanced below, and so repeats it here:

"The defendant justices argued in the court below, and the court accepted the argument, that under the doctrine of judicial immunity they are absolutely immune from a suit

seeking only injunctive relief and a declaratory judgment, when these same justices regularly entertain, on almost a weekly basis, mandamus actions brought against other Texas judges for actions allegedly exceeding the limits of judicial authority and discretion, which mandamus actions against state court judges are in effect actions for injunctive relief. There is no consistency, logic or justice in Defendants' argument on this point. Possibly Defendants regard consistency as merely the hobgoblin of small minds, incautiously unmindful that extreme and repeated judicial inconsistency can create in some small, consistent minds the appearance of rule by men and the absence or failure of the rule of law, which is one definition of tyranny, which in turn leads inevitably to anarchy and the supremacy of the *lex talionis*, a condition in which judges traditionally have not fared well or prospered, generally lacking the constitutional attributes requisite for survival.

"To uphold the immoderate claim by the defendant justices in this case of absolute judicial immunity would be to wrap them effectively in an entirely isolated, completely insulated cocoon, impenetrable by any federal court order, from which they could always with impunity hurl capricious thunderbolts, or at least poisoned darts. This immoderate claim of absolute judicial immunity is in fundamental conflict with the rationale of the opinion of the United States Supreme Court to be expressed in *United States v. Nixon et al.*, 94 S. Ct. ..... (1974)[5]. As between the two cases the principle of the case at bar, albeit not the case itself, may be the more important. For there is no question but that the legislative branch can withhold the purse from, and even impeach, the executive; and the actions of the executive, as well as of the legislature, are unquestionably subject to review by the judiciary, garrisoned and armed as it is with the general acceptance of the rule of law; but the only effective check on judicial excesses is ultimately in the judiciary itself, either by self-restraint or affirmative action as the circumstances

[5] This opinion has since been delivered, and is reported in 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

of the case require; and if the judiciary does not function properly and police itself effectively, its armed garrison eventually deserts, the balance wheel of our great tripartite system flies off, and we are all lost.

"Or, if "lost" overstates the case, we are at least left stranded on a broken-down tricycle in the mud of a somewhat unfamiliar jungle. Compare *l. talionis*, *supra*, with *United States v. Nixon*, *supra*.

"To put the argument on less philosophical and less metaphorical grounds, if, as will surely be expressed in the *Nixon* case, the President of the United States is not absolutely immune under all circumstances from the reach of a federal court order, it cannot be argued logically that state court judges possess any such immunity." Appellant's Brief, Court of Appeals, pp 31-3.

Petitioner also attempted to convince the court below of the importance of this case both in his short Reply Brief, to which this Court is also respectfully referred, and, with less reference to historical antecedents, in his Petition for Rehearing below, in which he stated:

> "The Court's footnote quotation from *Rooker v. Fidelity Trust Company* is not relevant because the federal constitutional questions attempted to be raised here were *not* raised in the state court proceedings attacked here, and were entirely extraneous and extrinsic to the state issues involved in the state case, the evidence adduced therein and the record thereof. Even Defendants admit in their brief that the issue of the financial interests of the defendant supreme court judges was not raised in the state court proceedings, but the Court apparently accepts Defendants' argument that Plaintiff's federal constitutional rights have been lost or waived by reason of his failure to find out about the Defendants' financial interests in the state court case before it was concluded, and while he still had time to file his petition for writ of certiorari in the Supreme Court of the United States. This is roughly comparable to saying that if the bank robber is not

caught before he leaves the bank building, he must be allowed to go scot-free and also, must be allowed to keep the money he stole. Or, to choose a more apt analogy, this is equivalent to saying that if the losing state court litigant does not find out that the judge was bribed until after the judgment has become final, the litigant has no due process remedy in the federal courts.

"As the Court points out, 'This is a civil rights suit, 42 U.S.C. § 1983.' *Rooker* was not. And *Rooker* (1923) was decided before *Monroe v. Pape* (1960), before *McNeese v. Board of Education* (1963), before *Mitchum v. Foster* (1972), before *Gibson v. Berryhill* (1973), before *Steffel v. Thompson* (1974), before *Allee v. Medrano* (1974) and before *Wall v. American Optometric Association, Inc.* (1974). Surely this Court knows that in this area the law has completely changed in the past 52 years since *Rooker* was decided. For example, in 1923 this Court undoubtedly would not have ordered extensive bussing of school children in Dallas.

"Finally with respect to *Rooker*, it was an attempt to relitigate in a suit between the same parties in the federal district court the same fact situation which had previously been litigated by the parties and decided not only in the state court but also, on appeal therefrom, by the Supreme Court of the United States. Compare *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), cited by the Court, with *Rooker v. Fidelity Trust Co.*, 261 U.S. 114 (1923). This is completely different from the situation presented here, where the parties are not the same and the legal issues are entirely different.

"The Court cites *Hill v. McKeithan*, where the prisoner-plaintiff, acting as attorney *pro se*, sued the state judge for personal damages as well as injunctive relief. Plaintiff thought perhaps all that the relatively erudite and relatively discursive per curiam opinion in that case stood for was the proposition that if you sue a state

court judge for personal damages as well as injunctive relief, you lose. The Court now in effect says that if you sue state court judges *only* for injunctive or declaratory relief and *not* for damages, you still automatically lose, for lack of federal jurisdiction. That is clearly and directly contrary to the recent Supreme Court decisions referred to above and discussed in Plaintiff's briefs.

"*Hanna v. Home Insurance Company* (1960), the third and final case cited by the Court, was also decided by this Court before *any* of the Supreme Court decisions referred to above, and turned on the failure of the complaint to allege any facts showing unlawful or improper conduct by the defendant state judges. 'There is no contention that the insurance company improperly influenced any of the judges or court attaches.' 281 F. 2d at 304. This Court has read the complaint, so it knows that is not this case; in fact, it is the opposite of this case.

> "In the place of the three non-supportive cases cited in its opaque and occult summary opinion the Court more appropriately might have cited in support thereof Franz Kafka, *The Trial*, and the court scene from *Alice in Wonderland*."

This unhappy case should not be swept under the rug, however tempting it might be to do so. The rug is too fine and valuable, and is heavily travelled. Its quality and usage are such that it deteriorates with too much dirt under it. In this connection, Petitioner suggests the relevance to the present situation of the brief but incisive remarks addressed to a different but comparable situation which were delivered by then Congressman George Bush on the floor of the House of Representatives on May 13, 1969, under the heading "The Paramount Importance That Judicial Integrity of The Supreme Court Be Entirely Above Suspicion", recorded in Congressional Record — House (91st Congress — 1st Session), Vol. 115, Part 9 at page 12344. Petitioner respectfully

refers the Court to Mr. Bush's profound and prophetic sentiments and language, and adopts them as his own with respect to the Supreme Court of Texas.

This case involves more than 1.2 *billion* dollars to the Texas Public Free School Fund, which might be argued to be a special and important reason to grant a writ. But Petitioner chooses not to labor on that oar which rightfully belongs to the Attorney General of Texas, who is charged by statute with the duty and responsibility to defend that fund but who yet will oppose this petition. Petitioner strives here only to return the laboring oar to its true owner.

Specifics

1. The Financial Interests of the Defendants Disqualified Them From the Vacancy Case, and the Judgments Rendered By Such Constitutionally Disqualified Judges Deprived Petitioner of Due Process of Law.

The uncontroverted allegation of the complaint is that the defendant state district judge, and one or more of the defendant state supreme court justices who participated in the determination of the Vacancy Case, owned stock in one or more of the corporate defendants in that case, and so were financially interested in the outcome of the case.

The complaint also alleged that large payments were made to the young son of the state district judge during the pendency of that case in the district court, and that such payments were not for any professional legal services rendered.

This Court has repeatedly held that the right to a trial before judges who have no financial interest in the subject matter of the litigation is a right guaranteed by the Due Process Clause of the Fourteenth Amendment. *Tumey v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927); *In Re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2nd 301 (1969); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2nd 267 (1972); *Gibson v. Berryhill*, 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2nd 488 (1973); see also Mr. Justice Powell, dissenting in *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633 at 1665 (1974): "In considering appellee's claim to have an impartial hearing examiner, we might start with a first principle: 'no man shall be a judge in his own cause.' Bonham's Case, 8 Co. 114a, 118a (1610)."[6]

Unless Petitioner's right to an adjudication by financially disinterested judges is a right without a remedy, the actions of the courts below fly squarely in the face of these decisions by this Court.

2. The Deer Hunt "Proceedings" Did Not Meet Procedural Due Process Requirements.

The complaint alleges in essence that the merits of the Vacancy Case were voted on and decided by a majority of the members of the Supreme Court of Texas at a deer hunt and party held on the land in controversy by the state court defendants and their attorneys and the state district judge during the pendency of the case in the state district court. Such proceeding did not meet the procedural due process requirements of the Fourteenth Amendment.

Neither Petitioner nor his counsel were given any notice of the proceedings.[7] Having no notice Petitioner could not

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[6] Dr. Bonham's Case, its antecedents and its aftermath, are discussed on pages 7-13 of Petitioner's memorandum to the District Court (A. 62-8) and on pages 4-8 of Petitioner's Reply Brief to the Court of Appeals.

[7] It would be nice if Petitioner's counsel were able to believe that the only reason he was given no notice and opportunity to attend was because his not inconsiderable accomplishments as a hunter (which far exceed his quite inconsiderable prowess in the fields of law) raised anxiety in the minds of the Defendants or their hosts with respect to their equal opportunities for gameful enjoyment or provoked concern that the deer themselves might be deprived by counsel's presence of the equal protection of the game laws. That would be nice, but counsel's prior experiences with the state court defendants and their attorneys, as well as this experience, teaches him that they were, as usual, after larger game.

appear and so had no opportunity to be heard. "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified' " *Fuentes v. Sherin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972). " 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L. Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner'. *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 1965." *Goldberg v. Kelly*, 397 U.S. 254, 267, 91 S. Ct. 1011, 1020 (1971). From the reports reaching Petitioner as to the time of evening the "poll" was taken and the other circumstances surrounding its taking, the "hearing" certainly was not "at a meaningful time and in a meaningful manner", however broad a range that phrase may have in the context of other cases.

The only witnesses present were witnesses for the state court defendants, and Petitioner, not being notified, did not have the opportunity even to cross-examine the adverse witness, much less call his own. The Defendants did not have the benefit (which they all subsequently eschewed) of arguments from Petitioner's counsel. Petitioner had no opportunity to make a record, no record was made, and the Defendant Justices did not have before them the voluminous record which had been laboriously constructed over a period of years in the courtroom a few miles away.

Petitioner could go on at length with citation of additional authorities, but suffice it to submit the proceeding was unconstitutional.

3. The Abstention or Non-Interference Doctrine of *Younger v. Harris* Cannot Be Extended to Justify Dismissal of the Case.

The District Court held (App. B, page 6) and the Court of Appeals perhaps inferred (App. A, page 1) that the

abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), required the dismissal of the complaint.

Petitioner does not feel justified in attempting to draw any detailed topographical map of the precise contours of the *Younger v. Harris* doctrine of abstention or non-interference. The present case is not even in the same geographical province with *Younger v. Harris* because at the time of the filing of the complaint there was no ongoing state proceeding, civil, criminal or administrative, which could be interfered with by the maintenance of the present action, and because the undenied complaint here alleges that the state tribunals were constitutionally disqualified. "Here the predicate for a *Younger v. Harris* dismissal was lacking, for the appellees alleged and the District Court concluded, that the State Board of Optometry was incompetent by reason of bias to adjudicate the issue before it". *Gibson v. Berryhill*, 93 S. Ct. 1689 at 1697 (1973). Just over a year ago this Court affirmed the holding of Judge Morgan, a member of the panel below in this case, that the non-interference doctrine of *Younger v. Harris* did not justify dismissal of a civil rights complaint brought, as here, under 42 U.S.C. 1983 and 28 U.S. C. § 1343 seeking injunctive and declaratory relief and alleging deprivation of procedural due process because of financial interest on the part of quasi-judicial board. *Wall v. American Optometric Association, Inc.* 397 F. Supp. 175, 184-7 (N. D. Ga. 1974) (3 judge court), judgment affirmed 95 S. Ct. 166 (1974).

In both of the cited cases the argument for non-interference or absention was supported by the existence of pending state proceedings, yet dismissal of the federal complaint was still held to be improper; whereas in the present case there is not any pending state proceeding to furnish support for dismissal of the federal claim; the complicating factor of an on-going state proceeding is simply not present here. If dismissal was improper in the two cases cited, *a fortiori* dismissal was improper here.

In *Steffel v. Thompson*, 94 S. Ct. 1209 (1974), this Court rejected the application of the abstention doctrine of *Younger v. Harris* where there was no on-going state proceeding pending, stating that in such situation "principles of federalism not only do not preclude federal intervention, they compel it". 94 S. Ct. at 1222.

One of the members of the panel below suggested during argument that Petitioner should have sought refuge in the federal courts as soon as he learned of the deer hunt "poll" and "advisory opinion" of the members of the Supreme Court of Texas while the Vacancy Case was pending in the state district court. If Petitioner had taken that dim and hazardous trail he would have been tripped up and skewered, as it turns out, in the subsequently laid trap of *Huffman v. Pursue, Ltd.*, 95 S. Ct. 1200 (1975), which teaches against skipping from state trial courts to federal district courts without going through the state appellate process. Furthermore, Petitioner surely had the right at least to hope if not expect that the defendant justices who participated in the deer hunt "proceedings" would disqualify themselves when and if the Vacancy Case reached their forum, and until the case reached their court and they refused to disqualify themselves no substantial or irremediable violation of Petitioner's civil rights had occured.

The same member of the panel below also inquired if Petitioner did not, after conclusion of the state appellate proceedings, have an adequate due process remedy in the state district courts. Ignoring the practical folly of starting up a path seeking ultimately a non-partisan judicial determination of the partisanship of judges by the very same partisan judges, Petitioner conceded for purposes of the argument that he had a state due process remedy. But the presence of a theoretical or even actual state remedy does not authorize dismissal of a complaint when this Court has repeatedly avowed that the federal courts are the primary guardians and principal custodians of federal constitutional rights, having been assigned by Congress the "paramount role" in protecting such rights, *Steffel v. Thompson, supra,*

and cases cited therein, and that "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwickler v. Koota*, 389 U.S. 241, 248, 88 S. Ct. 391, 395, 19 L. Ed. 2d 444 (1967). If our federal system was not conceived to take care of the situation presented in this case, at least this situation is certainly a compelling reason for its preservation.

The court below in its opaque opinion perhaps implies that Petitioner should have raised his due process claims by petition for writ of certiorari to this Court upon refusal of Petitioner's writ of error by the Supreme Court of Texas. But at that time Petitioner did not know of the financial interest of the Defendant appellate justices; and the only record of the other judicial improprieties of the Defendants in the state court record was in Petitioner's motion for rehearing in the Texas Supreme Court which had been stricken and completely expunged by the Defendant justices. Thus, Petitioner then had no record to try to bring to this Court. Nor could Petitioner have built his record in the state district court because no cause of action existed or matured against the Defendant appellate justices until they failed to disqualify themselves, and instead ruled in the case, and this did not occur until the same time they refused to hear the case. If Petitioner has a remedy it was in the federal district court which summarily ejected him.

4. No Doctrine of Judicial Immunity Justifies Dismissal of This Suit Solely for Injunctive or Declaratory Relief.

Petitioner has dealt with this point partially in the quotation *supra*, pp. 11-13, from his brief in the court below.

Petitioner respectfully submits that if there were some doctrine of absolute judicial immunity which precluded the maintenance in the federal courts of civil rights actions directed against state court judges and seeking only declaratory or injunctive relief, then in time the state judicial systems, instead of being stalwart co-defenders with the federal judiciary of our constitutionally guaranteed liberties, would

tend to become safe harbors for those who would subvert those federal rights and freedoms. This on the premises that power tends to corrupt, judicial immunity is a form of power, and absolute immunity tends to corrupt absolutely.

In *O'Shea v. Littleton*, 94 S. Ct. 669, 679-80 (1974) a majority of this Court very plainly indicated that a state judge who wilfully deprives a citizen of his constitutional rights is subject to fine and imprisonment under 18 U.S.C. 242, and that no doctrine of judicial immunity immunizes state judges from such punishment for such offenses. Construing the complaint here liberally in favor of Petitioner, it would certainly have to be conceded that Defendants' deprivations of Petitioner's constitutional rights were wilful. So we may assume for purposes of the present record that Defendants are subject to fine and imprisonment.

That is all well and good, and is as it should be. But it does not help the Texas Public Free School Fund, the principal victim of the crimes, or prevent the unjust enrichment of the major oil companies whose culpability is perhaps very little less than that of the Defendants but who, unlike Defendants, may not have been acting under color of law within the meaning of 18 U.S.C. § 242, absent proof of conspiracy. Surely incarceration of the Defendants is not the exclusive or even necessarily the most constructive remedy, particularly since the Defendants, for all Petitioner knows, possibly may be susceptible of rehabilitation and re-education, by simple federal declaratory judgment as to the unconstitutionality of their actions.

Of course, violation of a criminal statute as a general rule usually gives rise to a civil cause of action for damages in favor of the injured party whom the statute was designed to protect. But again that may not be a practical way to protect the Public Free School Fund. Petitioner probably commits no actionable libel of Defendants' credit to suggest that a judgment against Defendants, even jointly and severally, for more than 1.2 billion dollars might not be easily collectible.

The alternative civil remedy of injunctive or declaratory relief, which Petitioner attempted to fashion in his complaint, surely is the most appropriate remedy for certain circumstances, and should not be foreclosed by some doctrine of judicial immunity which leaves extant only the harsher and less remedial sanction of fine and imprisonment.

To the extent that the decisions of the court below are based on the application of a doctrine of judicial immunity that precludes injunctive or declaratory relief directed at state courts, they conflict with numerous decisions of this Court. A number of these, exclusive of the civil rights cases, are listed in the appendix to the opinion of Mr. Justice Douglas in *O'Shea v. Littleton*, 94 S. Ct. at 684. *Mitchum v. Foster*, 407 U.S. 225, 92 S. Ct. 2152, 32 L. Ed. 2d 705 (1972) held that suits under 42 U.S.C. § 1983 are exceptions to the bar against federal injunctions directed to state court proceedings provided in 28 U.S.C. § 2283. To apply some judicial immunity doctrine to complaints such as the one here, grounded on the Civil Rights Act, is to conflict directly and unavoidably with *Mitchum v. Foster* and civil rights cases following it. See, e.g., *Allee v. Medrano*, 94 S. Ct. 2191 (1974).

5. Section 11 of Article V of the Texas Constitution Requiring Certification of Disqualification of Justices Is Mandatory.

In Count Four of his complaint Petitioner alleged that, upon his filing of his petition for writ of error in the Supreme Court of Texas in the Vacancy Case, he also filed his motion, pursuant to Section 11 of Article V of the Texas Constitution, quoted on Page 3 above, for such court to certify to the governor for his appointment of substitute judges, as required by such provision of the state constitution, the disqualification of the Honorable Price Daniel and the Honorable Hawthorne Phillips, by reason of their having been counsel in the case. Before a decision by the Supreme Court of Texas in the Vacancy Case, the Honorable Hawthorne Phillips left the court, but the Honorable Price Daniel voluntarily recused himself by virtue of having been counsel in the case, and the Honorable Ruel Walker also

voluntarily recused himself, by reason apparently of his stock ownership in Texaco, Inc., one of the corporate defendants in the Vacancy Case (see *Broussard v. Texaco, Inc.* 491 S.W. 2d at 277 (Tex. Sup. 1972)). When the Texas Supreme Court refused the petition for writ of error of the Petitioner and the State of Texas, it also denied the motions of Petitioner and the State of Texas for certification to the governor of disqualified judges, without any explanation or reason for its refusal to comply with the unambiguous and mandatory requirement of the state constitution. In Count Four of his complaint, Petitioner alleged that the Texas Supreme Court had no judicial discretion or authority to refuse to certify the disqualification of those judges who were admittedly disqualified, that such certification was a ministerial obligation imposed upon the court by the state constitution, that the denial of Petitioner's motion to certify such disqualification constituted a violation of Petitioner's rights under the equal protection and due process clauses of the Fourteenth Amendment, and that such ruling also constituted an actionable violation of Petitioner's rights under the Texas Constitution.

The Supreme Court of Texas has previously recognized its obligation to comply with the provision of the Texas Constitution relied upon. In a case involving a fraternal organization of which all of the justices of the Supreme Court of Texas were members, the following appears:

> "All members of the Supreme Court were disqualified to sit in this case, and so certified their disqualification to the Governor of the state, whereupon, under authority contained in section 1517 of Vernon's Sayles' Revised Statutes of Texas, the Governor appointed a Special Supreme Court, consisting of three women, Mrs. Hortense Ward, Special Chief Justice, and Miss Ruth Virginia Brazzil and Miss Hattie L. Henenberg, Special Associate Justices, to hear and determine the issues." *Johnson v. Darr*, 144 Tex. 516, 277 S.W. 1098 (1925).

Petitioner is aware of no other decision by the Supreme Court of Texas, other than its ruling in the Vacancy Case, in

which that court has refused, upon motion timely filed, to certify to the governor the disqualification of any admittedly disqualified judge. The unexplained and unconstitutionally capricious refusal of such court to certify the disqualification of those judges who had voluntarily recused themselves from the Vacancy Case constitutes a denial to Petitioner of the equal protection of the laws and due process of law.

Of course, the Supreme Court of Texas is the final authority on the interpretation of the Texas Constitution so long as it does not interpret it in such way that the application thereof in a particular case results in a collision with rights guaranteed by the United States Constitution. But the Supreme Court of Texas has never interpreted the word "shall" in Section 11 of Article V of the Texas Constitution to mean "may" or anything other than what it very plainly says, nor did it do so in the Vacancy Case. It merely refused, without explanation or interpretation, to follow the clear mandate of the state constitutional provision providing a method for appointment of substitute judges in lieu of any disqualified judges.

In the absence of any interpretation of the state constitutional provision under which relief is sought, this Court should on the present record determine whether the word "shall" means "shall" or something else, and whether it is a mandatory provision, for non-compliance with which Petitioner may have a judicial remedy.

Even if this claim of Plaintiff should be construed as involving only a question of state law and not of federal law, still the District Court had jurisdiction thereof under the doctrine of pendent litigation because of the undeniable federal nature of the issues raised in other counts of the complaint, and the federal courts have the duty to render their own interpretation of the Texas Constitution in the absence of any contrary interpretation by the Supreme Court of Texas. U.M.W. v. Gibbs, 383 U.S. 715 (1966).

Petitioner should explain the importance to Petitioner of this point, and why it is in the case:

1. Although Petitioner can cite no rule or decision, it is accepted in Texas that the affirmative vote of three of the

nine justices of the Texas Supreme Court is required to grant a petition for writ of error.

2. Petitioner and the Attorney General's office were acutely aware of the deer hunt "poll" and "advisory opinion" and knew, or had to assume, they faced a court on which a majority of the members were previously committed to vote against them, regardless of the record.

3. Petitioner and the then Attorney General knew that Justices Daniel and Phillips (1) had been counsel in the case, (2) were literate lawyers who could read the constitutional provision regarding disqualification of judges, and (3) were honorable gentlemen, and would, therefore, disqualify themselves. Justice Walker had previously disqualified himself in another case involving Texaco, Inc., one of the defendants in the Vacancy Case and so he, also being both literate and honorable, might be expected to disqualify himself, as he did.

4. That would leave three justices disqualified which, assuming only that the court complied with the constitutional provision and certified such disqualification to the governor, would mean that the court in this case would include at least three impartial and uncommitted judges, a sufficient number to grant the writ.

5. Petitioner and the then Attorney General were confident that it would be difficult if not impossible for the Texas Supreme Court to write an opinion contrary to their position on the substantive state legal issues involved without (1) overruling several long lines of decisions by that court on settled principles of Texas property law, and (2) without acknowledging that in so doing it would be divesting The Public Free School Fund of title to several millions of acres of valuable land. Petitioner and the then Attorney General felt that a majority of the court would not write such an opinion, particularly if the court included three eminent Texas lawyers or outstanding lower court judges appointed by the governor, which he had indicated he would appoint upon receipt of the certification of disqualification.

6. Thus Petitioner and the Attorney General's office felt they had at least a chance of a fair hearing if the court would comply with the constitutional provision despite the commitments of the deer hunt proceedings, and they knew they had no chance unless it did so.

The Texas constitutional provision is a beneficial and salutary one. It permits what should be a fine honor to be accorded to outstanding lawyers and lower court judges, i.e., to act as members of the state's highest court in individual cases. To the extent that occurs, it fosters a healthy interaction between the supreme court justices and the bar and lower court judges, allowing the infusion of fresh and independent viewpoints from outside the cloisters of the court, under more constructive and meaningful circumstances than can be achieved by cavorting with litigants and their counsel on deer hunts designed to predetermine cases. It tends to avoid an increase in the workload of the justices in situations where one or more may be disqualified. This in turn should make justices less reluctant to disqualify themselves for interest, which in turn tends to make for a more impartial court more closely approaching the ideals of justice. The presence of a temporary "outsider" might even tend to make the permanent members more diligent and workmanlike in their research and reasoning in the particular case, and thus make for better precedents. Finally, the provision allows the litigants in each case to have their case decided by the same number of judges as all other litigants, and thus to approach more closely the ideal of the equal protection of the laws.

But even if the provision were not beneficial, the fact remains that it is a part of the Texas Constitution, and so the Defendants were under a duty to comply with it, at least here where Petitioner and the Attorney General had filed their motion expressly requesting such compliance. If Defendants were under a duty Petitioner must have the right to enforce the duty. If Petitioner has a remedy it exists only in the federal courts once the highest state court refuses to perform its duty.

Petitioner requests this Court to determine that "shall" means "shall", that the state constitutional provision is mandatory, and that Petitioner has an enforceable cause of action thereunder in a case where Petitioner has on other grounds a cause of action for violation of his federal constitutional rights.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

PAT S. HOLLOWAY,
3400 Republic National
Bank Tower,
Dallas, Texas 75201,
(214) 742-4538
Counsel for the Petitioner.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 26 day of December, 1975 mailed three copies of the foregoing Petition to each of the following counsel of record at the address indicated, by certified mail with sufficient postage prepaid:

Hon. John L. Hill
Attorney General of Texas

Hon. Larry F. York
First Assistant Attorney General

Hon. John Odam
Assistant Attorney General

Hon. Lonny F. Zwiener
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711

Hon. Allen Wood
920 Petroleum Tower
Corpus Christi, Texas

Hon. Luther E. Jones, Jr.
338 Laurel Drive
Corpus Christi, Texas 78404

I further certify that all parties required to be served have been served.

PAT S. HOLLOWAY,
3400 Republic National
Bank Tower,
Dallas, Texas 75201,
(214) 742-4538
Counsel for the Petitioner.

APPENDIX A

Walter C. ATCHLEY
Plaintiff-Appellant,

v.

Joe R. GREENHILL, Chief Justice, et al., etc.,
Defendants-Appellees.

No. 74-2187.

United States Court of Appeals,
Fifth Circuit.

Aug. 15, 1975.

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN, MORGAN and CLARK, Circuit Judges.

PER CURIAM:

This is a civil rights suit, 42 U.S.C., § 1983. It seeks relief from unsuccessful efforts to obtain Texas Supreme Court review of *Atchley v. The Superior Oil Company*, 482 S.W. 2d 883 (Tex. Civ. App., 1972). The litigation involved the legal title to certain valuable oil lands in Texas. No petition for *certiorari* was filed with the Supreme Court of the United States seeking review of the action of the Texas Supreme Court.

The District Court dismissed the suit on several grounds, particularly for lack of jurisdiction over the subject matter, Rule 12(b) (1) F. R. Civ. P.

Upon consideration of the record, briefs and oral argument heard in Atlanta on May 20, 1975, we are of the opinion that the judgment of the District Court is due to be affirmed. See, e. g., *Rooker v. Fidelity Trust Company*,

263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923);[1] *Hill v. McClellan*, 5 Cir., 1974, 490 F. 2d 859; *Hanna v. Home Insurance Company*, 5 Cir., 1960, 281 F. 2d 298, cert. denied 365 U.S. 838, 81 S. Ct. 751, 5 L. Ed. 2d 747.

Affirmed.

[1] "If the constitutional questions stated in the bill actually arose in the cause, it was the province and duy of the state courts to decide them, and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Until and unless so reversed or modified, it would be an effective adjudication. [Citations omitted] Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. [Citations omitted] To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original." 263 U.S. at 415, 416, 44 S. Ct. at 150.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

October 3, 1975

To All Counsel of Record

No. 74-2187 — Walter C. Atchley v. Joe R. Greenhill, Chief Justice, et al., etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rue 35, Federal Rules of Appellate Procedure: Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, *Clerk*

By Clare F. Sachs
Deputy Clerk

cc: Mr. Pat S. Holloway
Messrs. John L. Hill
David M. Kendall
Lonny F. Zwiener
Mr. Allen Wood
Mr. Luther E. Jones

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WALTER C. ATCHLEY,
Plaintiff,

v.

JOE R. GREENHILL, et al,
Defendants.

CIVIL ACTION
No. 73-H-1660

MINUTE ENTRY

Upon review of its Memorandum Opinion filed April 2, 1974, the Court has decided to make several changes as to matters of form. Accordingly, the Clerk shall substitute the two pages attached hereto for the first two pages of the opinion as it now appears. The opinion, with these pages so incorporated, is hereby ratified and adopted as the official Memorandum Opinion of the Court in this cause.

The Clerk shall send copies to all counsel.

DONE at Houston, Texas, this the 15th day of April, 1974.

JAMES NOEL
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WALTER C. ATCHLEY,

Plaintiff,

v.

JOE R. GREENHILL, et al,

Defendants.

CIVIL ACTION
No. 73-H-1660

Pat S. Holloway, Dallas, Texas, for plaintiff

Allen Wood, Corpus Christi, Texas, for defendant State of Texas District Judge

John L. Hill, Attorney General of Texas; Larry York and John Odam, Assistants Attorney General, Austin, Texas, for all other defendants

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MEMORANDUM OPINION

This controversy arose out of a state court suit filed by Walter C. Atchley, plaintiff herein, in state district court, San Patricio County, Texas in 1967. *Atchley v. Superior Oil Co.*, No. 13,436. That suit sought to establish that a tract of land in that county was vacant, unsurvey land under TEX. REV. CIV. STAT. ANN. art. 5421c § 6. Plaintiff named as defendants therein hundreds of individuals, oil companies, and other corporations who allegedly claimed interests in the land in controversy. After development of a considerable record, the State District Judge, a defendant herein, entered summary judgment in favor of defendants there. On appeal, the judgment was affirmed by the Court of Civil Appeals for the Ninth District of Texas, sitting at Beaumont. *Atchley v.*

Superior Oil Co., 482 S.W. 2d 883 (Tex. Civ. App. — Beaumont 1972). No judge of the Court of Civil Appeals for the Ninth District is a defendant here. Plaintiff's petition for writ of error was refused by the Texas Supreme Court on March 7, 1973, with the notation n.r.e. (meaning no reversible error), two Justices not sitting. The other seven Justices of the Texas Supreme Court are defendants herein. Plaintiff's motion for rehearing was overruled by the latter court on May 5, 1973.

In this action plaintiff claims irregularities and improprieties by defendants during the course of the litigation, but not by any judge of the Court of Civil Appeals. Asserting jurisdiction under the Civil Rights Act of 1871, 42 U.S.C. § 1983, plaintiff alleges that defendants' actions deprived him of his constitutional right to due process and equal protection.

In particular, plaintiff asserts in Count One that at a deer hunt and party, while the case was pending in the trial court, the trial judge consulted with six members of the Texas Supreme Court about the case and in accord with their opinions there expressed, rendered summary judgment in favor of defendants in the State District Court. In Count Two plaintiff contends the trial judge's son, an attorney, was employed by certain of the state court defendants and further that the judge's son was and is married to a relative of several individual defendants. In Count Three, plaintiff alleges that defendant trial judge, and one or more of the defendant justices owned stock or other securities in one or more of the corporate defendants in the state litigation. Finally, in Count Four, plaintiff contends that three members of the Texas Supreme Court who sat in the case were legally disqualified from sitting. TEX. CONST. ART V., Section 11. Nonetheless, according to plaintiff, the court failed to follow the constitutionally mandated procedure for appointment of substitute justices to hear the case.

As remedy, plaintiff seeks declaratory judgment that the trial court and Texas Supreme Court rulings and judgment are void. In addition, plaintiff prays for injunctive relief

expunging the jugment from the record and reinstating the case on the docket of the trial court.

At a hearing on January 11, 1974, defendants orally presented their motions to dismiss. At the conclusion of the hearing the Court announced its decision to dismiss the suit as frivolous, subject to plaintiff's motion for reconsideration, and entered its order accordingly on January 23, 1974. The parties subsequently submitted briefs on the issues raised by the case.

The Court has reviewed these briefs, the arguments and authorities presented therein, and is aware of the presumption of veracity ascribed to plaintiff's allegations at this point. *Barnes v. Merritt*, 376 F. 2d 8, 11 (5th Cir. 1967); *Due v. Tallahassee Theatres, Inc.*, 333 F. 2d 630, 631 (5th Cir. 1964). Nevertheless, the Court remains convinced that plaintiff's complaint does not allege a cause of action congizable in federal court.

First, this federal district court does not have subject matter jurisdiction over plaintiff's claim. FED. R. CIV. P. 12(b)(1). Plaintiff essentially seeks reversal of the state court judgments and grant of a new trial. Such relief is in the nature of appellate review and outside the purview of this Court's jurisdiction. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Essanay Film Manufacturing Co. v. Cane*, 258 U.S. 358 (1922). "A federal district court has no original jurisdiction to reverse or modify the judgment of a state court." *Hill v. McClellan*, No. 73-2686 (5th Cir. March 8, 1974); *Hanna v. Home Insurance Co.*, 281 F. 2d 298 (5th Cir. 1960). The fact that a state court judgment may have been unconstitutionally rendered does not vest the federal district court with jurisdiction to review the state proceedings. *MacNeil Bros. Co. v. Cohen*, 264 F. 2d 186 (1st Cir. 1959); *Williams v. Tooke*, 108 F. 2d 758 (5th Cir. 1940). See also *Rooker v. Fidelity Trust Co.*, supra.

It is clear from plaintiff's pleadings that he was apprised of the trial judge's alleged connection with the state court defendants during pendency of the suit. In fact, plaintiff

indicated his desire to waive any disqualification. Plaintiff also knew of the alleged improprieties by the Texas Supreme Court justices before that court's decision was final.

Plaintiff's duty was to raise his contentions before these forums. Any adverse ruling involving any constitutional defect could have been appealed to the United States Supreme Court. *Angel v. Bullington*, 330 U.S. 183 (1947); *Adams v. United States*, 302 F. 2d 307 (5th Cir. 1962). Having failed to develop his contentions in state court, and having failed to appeal adverse judgments, plaintiff cannot relitigate such issues here. *Paul v. Dade County, Florida*, 419 F. 2d 10 (5th Cir. 1969); *Ramirez v. United States*, 294 F. 2d 277, 283 (9th Cir. 1961).

The fact that plaintiff now sues the judges rendering the contested decisions does not change this result. *Tang v. Appellate Division of the New York Supreme Court*, 42 LW 2245 (2nd Cir. October 19, 1974); *Brown v Chastain*, 416 F. 2d 1012 (5th Cir. 1969); *Seguros Tepeyac, S.A. v. Jernigan*, 410 F. 2d 718 (5th Cir. 1969). Federal courts do not have general power to mandamus state judges to vacate state court judgments. *Wells Fargo Co. v. Taylor*, 254 U.S. 175 (1920); *Lamar v. 118th Judicial District Court of Texas*, 440 F. 2d 383 (5th Cir. 1971); *Clark v. State of Washington*, 366 F. 2d 678 (9th Cir. 1966).

Secondly, the complaint fails to state a claim upon which relief can be granted, FED. R. CIV. P. 12(b)(6), because of judicial immunity. The Civil Rights Act does not abrogate that bar. E.G., *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967); *McAlester v. Brown*, 469 F. 2d 1280 (5th Cir. 1972). Plaintiff contends that judicial immunity only applies to suits for money damages, citing *United States v. McLeod*, 385 F. 2d 734, 738 n. 3 (5th Cir. 1967). The recent case of *Hill v. McClennan*, No. 73-2687 (5th Cir. March 8, 1974) refutes plaintiff's distinction. In a per curiam opinion, the court (the panel of which included Judge Wisdom, author of *McLeod*) affirmed dismissal of a § 1983 suit against a state judge and others. The dismissed action sought both damages and an order voiding a state judgment.

The Court held "Judges acting within their jurisdiction and authority are immune from suit under §§ 1983 and 1985." citing *Pierson, McAlester* and others. Plaintiff herein has made no suggestion that the judgments entered in the state proceedings were beyond the courts' authority or jurisdiction.

Finally, the principle of comity requires the Court to refrain from entertaining this suit. Defendant justices and judge are charged with personal improprieties in the discharge of their duties as state officials. The concept of minimal federal interference with state government dictates that this matter be dealt with by state procedures. The prospect of federal court reviewing state court proceedings for judicial bias or interest is an effrontery to the concept of federalism. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

For the forgoing reasons, plaintiff's complaint was properly dismissed, and accordingly, plaintiff' motion for reconsideration is denied.

The Clerk shall file this Memorandum Opinion and furnish a copy to all counsel.

DONE at Houston, Texas, this 2nd day of April, 1974.

JAMES NOEL

Judge

SUPREME COURT, U. S.
FILED
FEB 11 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-918

* * *

WALTER C. ATCHLEY,
Petitioner,

v.

JOE R. GREENHILL, CHIEF JUSTICE, AND ZOLLIE STEAKLEY, JACK POPE, THOMAS M. REAVLEY, SEARS McGEE, JAMES G. DENTON AND SAM D. JOHNSON, ASSOCIATE JUSTICES, OF THE SUPREME COURT OF TEXAS AND JOHN H. MILLER, JUDGE OF THE DISTRICT COURT OF SAN PATRICIO COUNTY, TEXAS, 36TH JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO.

* * *

WALTER C. ATCHLEY,
Petitioner,

v.

JOE R. GREENHILL, CHIEF JUSTICE, AND ZOLLIE STEAKLEY, JACK POPE, THOMAS M. REAVLEY, SEARS McGEE, JAMES G. DENTON AND SAM D. JOHNSON, ASSOCIATE JUSTICES, OF THE SUPREME COURT OF TEXAS AND JOHN H. MILLER, JUDGE OF THE DISTRICT COURT OF SAN PATRICIO COUNTY, TEXAS, 36TH JUDICIAL DISTRICT OF TEXAS

* * *

RESPONDENTS' BRIEF IN OPPOSITION

* * *

OPINION BELOW

Petitioner seeks to review the opinion of the United States Court of Appeals for the Fifth Circuit reported at 517 F.2d 692. That opinion affirmed per curiam, the memorandum opinion of the United States District Court for the Southern District of Texas. The district court opinion is unreported, but a copy appears as Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

The formal, procedural requisites would appear to be satisfied in this case although Respondents dispute

Petitioner's assertion that rights guaranteed by the United States Constitution have been denied him.

QUESTIONS PRESENTED

Petitioner describes five questions allegedly presented by the Application for Writ of Certiorari. Respondents feel that the question (or questions) presented can be more accurately and appropriately described as

Whether or not Petitioner can maintain a civil rights suit against the Texas District Judge who entered a summary judgment against him as Plaintiff in a vacancy case, and against Justices of the Supreme Court of Texas who refused to grant a writ of error in that case:

(1) Where Petitioner's suit in the federal district court was in the nature of an appeal seeking to review the judgment of the Supreme Court of Texas;

(2) Where the claim for relief is in essence a suit against the State of Texas and would require the granting of retroactive relief by the federal courts;

(3) Where the Texas judge and justices, in deciding adversely to Petitioner, were acting in their judicial capacity, thus giving rise to the doctrine of judicial immunity;

(4) Where Petitioner does not attack the judgment of the Court of Texas Civil Appeals at Beaumont which affirmed the District Court's decision against Petitioner and which Court of Civil Appeals decision was found to have no reversible error by the Texas Supreme Court justices who are defendants here;

(5) Where the affirmative injunctive relief requested by Petitioner against the Texas District Court and the Supreme Court of Texas lies without the power of the federal courts to grant; and

(6) Where the federal issues presented by Petitioner to the federal court below were or could have been raised in the state courts of Texas so that the

doctrines of res adjudicata and collateral estoppel are applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner claims that the due process clause of the Fourteenth Amendment to the United States 42 U.S.C. § 1983, and Section 11 of Article V of the Texas Constitution are involved.

Respondents say that the Eleventh Amendment to the United States Constitution is pertinent to a decision in this case.

STATEMENT OF THE CASE

Petitioner filed suit in the state district court of San Patricio County, Texas, alleging that certain lands in the county had never been granted by the State of Texas and constituted a vacancy. The suit was brought under Article 5421(c), § 6 of Vernon's Texas Civil Statutes. This statute provides that the vacancy claimant, if successful, will be entitled to an interest in the minerals lying under the vacancy as a reward for finding the vacant land.

The occupiers of the surface were named as defendants along with numerous oil companies which had produced oil and gas from the tract for many years prior to the institution of the lawsuit.

The state district judge, Respondent John H. Miller, after an extensive record was developed, granted the vacancy defendants' Motion for Summary Judgment. Petitioner appealed this decision to the Texas Court of Civil Appeals and the trial court's judgment was affirmed on May 25, 1972, the decision reported as *Atchley v. Superior Oil Company*, 482 S.W. 2d 883 (Tex.Civ.App., Beaumont 1972).

Atchley then petitioned the Supreme Court of Texas

for writ of error, a procedure analogous to the petition for writ of certiorari used in the Supreme Court of the United States. The writ of error was refused by the Supreme Court on March 7, 1973, without written opinion with a notation "n.r.e.", meaning "no reversible error." Two of the nine justices of the Texas Supreme Court had recused themselves from acting on the petition for writ of error, one because of an interest in one of the defendant oil companies and one because of prior representation of Petitioner in the district court of San Patricio County. The seven justices who refused the writ of error are defendants below.

After the initial adverse determination by the Supreme Court, Atchley filed a Motion for Rehearing, wherein for the first time he raised, in the state courts of Texas, the issues presented to the federal district court below, (except for the question of defendant Judge Miller's ownership of an interest lying within the vacancy which was first considered at a hearing before the trial court where all parties to the suit, including Atchley, indicated that they were satisfied that Judge Miller was not disqualified).

In the Motion for Rehearing in the Texas Supreme Court and in the Complaint in the federal district court below, Atchley alleged that, while the vacancy case was pending in the Texas district courts, the district judge and members of the Texas Supeme Court met at a deer hunt and party and discussed the pending vacancy case. In this discussion, Atchley asserted that the members of the Supreme Court gave their opinion as to the merits of the vacancy lawsuit. Defendant Judge Miller, according to Atchley, then returned to his district bench and, in accordance with the opinion expressed by the members of the Texas Supreme Court, rendered Summary Judgment in favor of vacancy defendants and against Atchley. It was also alleged by Atchley that the trial

judge's son, an attorney, represented certain of the state court defendants in a vacancy case and that payments were made to him which were not for professional services. It was further asserted that the trial judge and certain of the Supreme Court justices owned stock in one or more of the corporate vacancy case defendants.

The defendant judge and justices filed a Motion to Dismiss which was granted by the federal district court below.[1] The Court of Appeals for the Fifth Circuit affirmed and rehearing was denied. This Petition for Writ of Certiorari followed.

ARGUMENT AND AUTHORITIES

I. The Federal District Court Below Lacked Subject Matter Jurisdiction To Hear And Decide Atchley's Claims Of Due Process Denial.

The court below rested its dismissal of Atchley's Complaint, in part, on its lack of jurisdiction over the subject matter. Rule 12(1), F.R.Civ.P. This decision as to jurisdiction was correct and should be affirmed by this Court for three reasons.

1. The Case Below Was In The Nature Of An Appeal Which Lies Without The Jurisdiction Of A Federal District Court.

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[1]Petitioner correctly suggests at page 11 of the Petition in the section, "Reasons Why Writ Should be Granted," that the district court, in dismissing the Complaint, and the court of appeals, in affirming the dismissal, were obligated to accept the allegations made as true. Petitioner says, "The Complaint is not only legally true, *but it is also true in fact.*" (Emphasis supplied) The first clause of the quoted statement is properly made, but the emphasized, second clause is improper and borders on the unethical. Respondents, accordingly, in response would say *the Complaint is untrue, in fact, and that there was no "deer hunt advisory opinion" and that they owned no stock in any of the corporate defendants in the vacancy case.*

Petitioner essentially seeks to reverse the judgment of the Supreme Court of Texas, relief in the nature of an appellate review.

A federal district court lacks appellate jurisdiction to make the determination called for by Petitioner Atchley, that function being accorded to the Supreme Court of the United States under the judicial framework of our federal system. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923);*Essanay Film Manufacturing Co. v. Kane*, 258 U.S. 358 (1922);*Hill v. McClellan*, 490 F.2d 859 (5th Cir. 1974); *Brown v. Chastain*, 416 F.2d 1012 (5th Cir. 1969), cert. den. 397 U.S. 951 (1970); *Paul v. Dade County, Florida*, 419 F.2d 10 (5th Cir. 1969).

While the cases in the circuit below are not totally consistent in holding that a federal district court lacks the necessary appellate jurisdiction to review a decision by the highest court of a state (compare *Mack v. Florida State Board of Dentistry*, 430 F.2d 862 (5th Cir. 1970) with the cases above cited), the latest expression on the subject by Fifth Circuit is found in *Hill v. McClellan*, supra, wherein it was succinctly stated that

> "A federal district court has no original jurisdiction to reverse or modify the judgment of a state court." 490 F.2d 862.

Petitioner seeks to draw a distinction between the instant case and the decisions in *Rooker v. Fidelity Trust Co.*, supra; *Paul v. Dade County, Florida*, supra; and *Brown v. Chastain*, supra, since in those decisions the federal claims were raised and considered in the state courts, while, in the present case, Petitioner maintains that his federal claims were not raised and considered in the state courts. This distinction is without substance.

It should first be noticed that the district judge, Judge Miller, a Defendant below and Respondent herein, raised the question of his possible

disqualification early in the vacancy case (reference is made to the Transcript of this proceeding attached as Exhibit B to Defendants' Memorandum Brief in Support of Defendants' Motion to Dismiss filed in the case below and a part of the on appeal in the Fifth case below and a part of the record on appeal in the Fifth Circuit). Judge Miller disclosed an interest in a tract of concluded by Atchley that this land was not within the claimed vacancy.

Judge Miller also revealed that he had an interest in Coastal States Gas Producing Company, a company which, with possible affiliates and subsidiaries, apparently gathered and transported natural gas from some of the properties within the alleged vacancy. It was noted that Coastal States had filed an answer in the suit disclaiming any interest in the vacancy. Petitioner, through Mr. Holloway, his attorney then and now, observed:

> "The Plaintiff named Coastal States, I believe in their Original Petition, and we subsequently ascertained, as far as we are concerned, that Coastal States claims no interest in the land, and we, as Plaintiffs, have urged no claim against Coastal States."

Later Mr. Holloway stated:

> "So far as the plaintiff is concerned the ownership of stock presents no disqualification, Your Honor."

Atchley then took a non-suit against Coastal States to avoid any possible question of Judge Miller's disqualification.

Regarding the alleged stock ownership by the Defendant Supreme Court Justices, observation is made that one justice recused himself because of stock ownership in a defendant vacancy-case corporation and

another because of earlier representation of the Petitioner Atchley in the vacancy case. However, Petitioner filed no motion to disqualify other justices before judgment because of possible stock ownership and no allegation of pecuniary interest by the justices appeared in either of his motions for rehearing before that Court, his first motion which was struck from the record or his second which was subsequently filed.

Even in his Complaint in the district court below, Atchley said only that:

> "Plaintiff has been informed . . . and *chooses to believe*. . . that the defendant District Judge John H. Miller and one or more of the other Defendants herein (the Justices) . . . owned stock or other securities in one or more of the corporate defendants in the vacancy case." (Emphasis added).

Nowhere did Petitioner allege that this "information" "which he chooses to believe" was unknown to him at the time the vacancy case was presented to the Texas Supreme Court or that it could not have been discovered by the exercise of due diligency. Without such or similar allegations, the Complaint (besides being deficient in stating a cause of action with regard to the asserted stock ownership of the Defendant Justices) is deficient in supporting Petitioner's proposition that he should have a federal forum since the federal issues were not presented to or decided by the state courts.

Moreover, constitutional rights, like all other rights, can be waived if not properly raised, as will be shown below. While Petitioner has argued the absurdity of presenting the disqualification of the justices to the state district court, it would have been neither absurd nor futile to have presented the question of justice disqualification to the Texas Supreme Court.

of justice disqualification to the Texas Supreme Court.

Petitioner's lack of enthusiasm in the state courts for his now asserted constitutional rights is further demonstrated by his failure to raise the alleged "deer hunt advisory opinion" given by the Defendant Justices to the Defendant Judge, at the district court level where the point might have been urged by a motion for disqualification and certainly by motion for new trial. (Articles 15 and 200a, Vernon's Texas Civil Statutes and Rules 320 et seq., Texas Rules of Civil Procedure). And this alleged activity on the part of the judge and justices was certainly known to Petitioner before the judgment of the district court as shown by Paragraph 5, Page 5 of the Complaint and Page 28 of his Brief in the Court of Appeals.

In sum, the case below involved the alleged denial of civil rights which Petitioner *failed*, neglected or refused to bring to the attention of the Courts of the State of Texas at a time when such urged issues could have been easily resolved.

Certainly, all of the alleged disqualifying factors could have been presented to the Supreme Court of Texas by his second Motion for Rehearing, even though Atchley's first Motion for Petition of Rehearing was ordered struck from the record as being unprofessional and contemptuous. Such allegations and the decision thereon could then have been presented to this Court. Moreover, the very act of the Supreme Court of Texas in striking the first Motion for Rehearing, could have been reviewed by this Court, and if the decision to strike the petition was unwarranted, proper, remedial relief could have been ordered.

Accordingly, it is evident that *Paul v. Dade County, Florida* and *Brown v. Chastain* must stand for the proposition that a federal district court will not review the judgment of a state court where the federal issues

were litigated in the state courts or where the federal issues *should* have been litigated. *Cambist Films Inc. v. Duggan*, 475 F.2d 887 (3rd Cir. 1973) *Kriesel v. Berkshire Associates, Inc.*, 452 F.2d 491 (4th Cir. 1971); *Nickerson v. Kutschera*, 390 F.2d 812 (3rd Cir. 1968); *Acree v. Air Line Pilots Association*, 390 F.2d 199 (5th Cir. 1968).

It is also clear that constitutional rights can be foreclosed and waived by the failure to urge such rights at the proper time, unless an excuse for such failure can be affirmatively shown, i.e., an excusable lack of knowledge of such right or a showing of the ineffectiveness of counsel at the purported waiver. *Henry v. Mississippi*, 379 U.S. 443 (1965); *Davis v. United States*, 411 U.S. 233 (1973); *Tollett v. Henderson*, 411 U.S. 258 (1973); and *Winters v. Cook*, 489 F.2d 174 (5th Cir. en banc, 1973).

It is equally clear that parties to a federal action cannot confer jurisdiction on a federal court where none exists by procedural manipulations. *Carribean Mills, Inc. v. Kramer*, 392 F.2d 387 (5th Cir. 1968), affirmed 394 U.S. 823 (1969).

Petitioner's failure to raise his federal claims in the state courts of Texas and his failure to assert these claims in the Supreme Court of the United States, should not, and does not create a forum in a federal district court which would not have been available to him had he raised the federal questions in the state courts at the proper time.

2. There Is No Federal District Court Jurisdiction Where Judges Of A State Court Are Sued In A Civil Rights Action For Acts Done Within The Scope Of Their Judicial Duties.

Forming a part of the lack of subject matter jurisdiction here, is the doctrine of judicial immunity as

interpreted by the Court of Appeals below. (As later noted, judicial immunity also provides a basis for dismissing the petition below for failure to state a cause on action upon which relief can be granted).

Relying on *Pierson v. Ray*, 386 U.S. 547 (1967), the Court in *Cheramie v. Tucker*, 493 F.2d 586 (5th Cir. 1974),observed that "Section 1983 (under which Petitioner is seeking relief) does not affect the well established rule that judges are immune from damage suits arising out of the exercise of their judicial function." The Court in *Cheramie* next noted that the plaintiff-appellant was not seeking damages, but rather was asking the federal courts to hold the state court decision to be unconstitutional. The Court then stated:

> "Furthermore, it is far from clear that the relief appellant requests is equitable. He requests us to hold the state appellate decision unconstitutional, a measure which would presumably reinstate the judgment rendered in the trial court. In essence the appellant seeks reinstatement of a damage award against the State of Louisiana's Highway Department. This is a result not directly obtainable under § 1983." 493 F.2d 588.

Seemingly, the Court is holding that there is no cause of action against state judges who have acted in a judicial capacity, under Section 1983, Title 42, U.S.C. Ergo, no subject matter jurisdiction.

Again, the Court of Appeals for the Fifth Circuit, in *Hill v. McClellan*, supra, at page 860, wherein plaintiff-appellant was seeking in part an order from the federal courts voiding a state judgment, said:

> "There is no cause of action under the Civil Rights Act if a case is private litigation in which the state does no more than furnish the forum

> and has no interest in the outcome . . . Merely characterizing defendants' (the Courts') conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted under the Civil Rights Act."

* * * * *

Accordingly, the district court below was correct in determining that it lacked subject matter jurisdiction in this cause for the reasons that Atchley's cause of action is an attempt to obtain appellate review in a federal district court of a state court judgment and because Section 1983, the Civil Rights Act, does not create a cause of action where the named defendants are judges of the state judiciary and the acts complained of arose from the exercise of their judicial functions. And the Court of Appeals was correct in affirming this determination.

II. The District Court Below Properly Dismissed Atchley's Lawsuit For Failing To State A Claim Upon Which Relief Can Be Granted And The Court Decision.

The federal district court below based its decision to dismiss the Complaint, as noticed above, on the lack of subject matter jurisdiction. In addition, the district court justified its dismissal on the failure of the Complaint to state a claim upon which relief can be granted. F.R.Civ.P. 12(b)(6). The court of appeals affirmed. Respondents say the Complaint failed to state a cause of action in four particulars.

1. Atchley's Petition Failed To State A Cause Of Action Because The Requested Relief Can Never Be Granted Without Joining The Judges Of The Intermediate Appellate Court Which Reviewed And Affirmed The Judgment

Of The Trial Court Which Had Decided The Vacancy Case Adversely To Atchley.

Defendant John H. Miller, the Texas district judge presiding over the district court of San Patricio County, Texas, entered a summary judgment rejecting the contentions of Atchley in the vacancy case.

On appeal, the judgment was affirmed by the Court of Civil Appeals for the Ninth District of Texas, sitting at Beaumont. *Atchley v. Superior Oil Company*, supra.

Petitioner then sought review by the Supreme Court of Texas by petition for writ of error which was refused by the Texas Supreme Court on March 7, 1973.

Petitioner seeks to require the state district court and the Supreme Court of Texas to expunge from their records the respective judgments of the two courts and further asks that the vacancy case be reinstated on the docket of the district court. Even if such relief was proper and were granted, the unattacked decision of the Beaumont Court of Civil Appeals in favor of the vacancy case defendants and adverse to Atchley would stand forever as a bar to any further proceeding by Atchley to establish his vacancy claim.

The Supreme Court of the United States in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937), observed at page 241 of the opinion:

> "Where there is . . . a concrete case admitting of an immediate and definitive determination of the legal rights of the parties . . . , the judicial function may be appropriately exercised . . . "

Here, the legal rights asserted by Petitioner cannot be resolved by a "determination of the legal rights of the parties" absent an attack on the Beaumont Court of Civil Appeals judgment. The relief which Petitioner is

seeking, the recommencement of the vacancy case, can never be obtained in the present cause. Accordingly, no claim is stated upon which the relief desired can be granted and the "judicial function" of the federal courts should not be "exercised".

2. The Relief Requested By Atchley Would Have Required The Federal Court To Order Affirmative Action By The Texas Courts And So Dismissal Was Proper.

As demonstrated above, even if Petitioner obtained the relief requested in his Complaint, the result which he is seeking, the continuation of his vacancy case, would not have been achieved -- the still existing and still valid decision of the Beaumont Court of Civil Appeals stands squarely for the proposition that Atchley has no right to further adjudicate his vacancy case.

Appellees would further urge that the relief requested, while being pointless and fruitless, is not within the power of the federal district court to grant. It is reiterated that Petitioner seeks to *require* the state district court and the Supreme Court of Texas to expunge from their records the respective judgments of the two courts and further asks that the Texas courts be required to reinstate the vacancy case on the docket of the district court.

While the federal courts may, under proper circumstances, have the power to stay or enjoin a state court from enforcing a judgment that offends constitutional principles and the power to enjoin judgment holders from deriving benefits from such judgment, they may not properly require affirmative action of any state court. *Marshall v. Holmes*, 141 U.S. 589 (1891); *Dixon v. Beto*, 472 F.2d 598 (5th Cir. 1973).

Accordingly, the Complaint, in asking the Court to compel positive, affirmative action by the Texas courts,

is requesting an impossible act and fails thereby to state a claim upon which the relief prayed for may be granted.

3. The Doctrines Of Res Adjudicata And Collateral Estoppel Bar Recovery By Atchley.

The Complaint below clearly shows that the issues which Petitioner asserts in the instant case were raised in the state courts of Texas and decided adversely to Atchley *or* that such issues could have been and should have been raised.

The question of Judge Miller's disqualification was raised in the state district court and a decision was made that he was not disqualified, a decision concurred in by Petitioner. No question of Judge Miller's disqualification was raised on appeal in the Texas appellate courts, and this default is sufficient to bar any relief on this issue in the federal courts. *Barbour v. Georgia*, 249 U.S. 454 (1919); *Houston Oil Co. v. Kimball*, 122 S.W. 533 (Tex.Sup. 1909).

The "deer hunt advisory opinion" issue was presented to the Supreme Court of Texas by Plaintiff's first Motion for Rehearing, and note is made that a constitutional, due process claim can be made by Motion for Rehearing. *Sanders v. Shaw*, 244 U.S. 317 (1917). While this pleading was stricken from the records as being unprofessional and contemptuous in both content and spirit, the Court's decision to strike perforce means consideration of the motion. And if there had been merit to the content of the Motion, it would have been improper to order the striking of the Motion. This impropriety could have been presented to the United States Supreme Court for its consideration. Parenthetically, Plaintiff could have reinforced his chances of the United States Supreme Court review by filing a Motion to Disqualify the "deer hunt" justices

prior to their decision, asserting their interest in the suit by virtue of their claimed deer hunt activities. If the allegations involving the deer hunt demonstrated a due process denial, then the judgment of the Supreme Court of Texas could have been set aside by the United States Supreme Court.

While the question of asserted pecuniary disqualification of the Texas justices was not raised in the state courts of Texas, it should have been raised or the non-negligent failure to raise the issue should have been explained in the Complaint. (Petitioner obviously knew of the participation of Judge Miller's son in the vacancy case since he attended the state court hearings). hearings).

Appellees urge that the principles of res adjudicata and collateral estoppel bar recovery by Petitioner in this cause. The application of these doctrines bars a re-determination of issues which have been presented to an earlier court *and issues which should have been presented. American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Cambist Films, Inc.*, supra, *Nickerson v. Kutschera*, supra; *Acree v. Air Line Pilots Association*, supra.

The fact that the parties are not identical does not defeat estoppel or res adjudicata. There would be an identity of the parties if the vacancy case defendants (the judgment holders against Atchley) had been made parties to this suit. The failure to join these defendants will not defeat the application of res adjudicata and collateral estoppel. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Tang v. Appellate Division of the New York Supreme Court*, 487 F.2d 138 (2nd Cir. 1973); *Seguros Tepeyac, S.A. v. Jernigan*, 410 F.2d 718 (5th Cir. 1969); Restatement Second of Judgments, sec. 88 (Tentative Draft No. 2, 1975). In *Seguros*, the Court observed:

> "Appellant's second contention as to the need for an identity of parties in a collateral estoppel situation is also without merit. We note, to begin with, that an increasing number of courts have dispensed with the requirements of identity of the parties or mutality of estoppel in situations where the party against whom the estoppel is applied has already had his 'day in court.'" 410 F.2d at 727.

See also *Rachal v. Hill*, 435 F.2d 59, 61 (5th Cir. 1970); *St. Louis Typographical Union No. 8 v. Herald Company*, 402 F.2d 553 (8th Cir. 1968); *Application of Pritchard*, 463 F.2d 1359 (Ct. of Custom & Patent App., 1972); *Iacaponi v. New Amsterdam Casualty Company*, 379 F.2d 311 (3rd Cir. 1967), cert. den. 389 U.S. 1054 (1968).

Finally, where collateral estoppel and res adjudicata are evident from the Complaint, dismissal is proper. *Nickerson v. Kutschera*, supra; *Iacaponi v. New Amsterdam Casualty Company*, supra.

The Complaint was properly dismissed under the doctrine of res adjudicata and collateral estoppel, their application to Petitioner revealing the lack of a claim upon which relief can be granted.

4. The Complaint Below Was Properly Dismissed Since The Defendant Judge And Defendant Justices Are Immune From Civil Suits.

Petitioner's Complaint in the federal district court attacked the judicial acts of the defendant judge and justices.

In *Cheramie v. Tucker*, supra, the Court of Appeals for the Fifth Circuit observed, citing *Pierson v. Ray*, supra, that the doctrine of judicial immunity is

universally recognized in suits for damages against the judiciary, and further noted that, where only equitable or injunctive relief is sought, judicial immunity may not apply according to some decisions. But the Court then noted that equitable relief would also cause "real interference with the discretionary functions of the judge" and rejected the line of authority that does not recognize judicial immunity where damages are not sought.

Moreover, in *Hill v. McClellan*, supra, the Fifth Circuit held that judicial immunity was applicable and viable both where the relief sought is in the form of damages or where the setting aside of a state court order is requested. The Court stated, at page 860 of the opinion, that

> "Judges acting within their jurisdiction and authority are immune from suit under §§ 1983 and 1985."

The Court went on to say that the plaintiff-appellant

> "has not stated a claim for which relief may be granted under 42 U.S.C. §§ 1983 and 1985".

Under the authority of *Hill v. McClellan*, supra, and *Cheramie v. Tucker*, supra, the Respondents say that Petitioner has not stated a claim for which relief can be granted.

* * * * *

It must be concluded that the district court below was correct in dismissing this cause for failure to state a claim upon which relief can be granted because the relief requested will in no way open the vacancy case to retrial, because the relief requested against the Texas state courts lies without the power of a federal district court to grant, because the doctrines of res adjudicata and collateral estoppel bar any affirmative decision in

favor of Petitioner, and because the doctrine of judicial immunity precludes relief against any of these judicial defendants. The Court of Appeals was correct in affirming the dismissal.

CONCLUSION

For the reasons advanced above, the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, attorney for Respondents, certify that two copies of the above and foregoing Respondents' Brief in Opposition have been served by placing same in the United States Mail, certified, postage prepaid, addressed to : Mr. Pat S. Holloway, Attorney at Law, 3400 Republic National Bank Tower, Dallas, Texas, 75201, on this the _____ day of January, 1976.

LONNY F. ZWIENER
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